NO. 230

In the Supreme Court of the United States

OCTOBER TERM, 1951

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION AND INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 13,
Petitioners,

v.

JUNEAU SPRUCE CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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CITATIONS

CASES:

In the Supreme Court of the United States

OCTOBER TERM, 1951

No. 280

INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION AND INTERNATIONAL LONGSHOREMEN'S & WAREHOUSEMEN'S UNION, LOCAL 16, *Petitioners*

v.

JUNEAU SPRUCE CORPORATION

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

OPINION BELOW

The opinion of the District Court for the Territory of Alaska, rendered upon petitioners' motions

and demurrers, is reported at 83 F. Supp. 224. The opinion of the Court of Appeals (R. 1106) is reported at 189 F. 2d 177.

JURISDICTION

The jurisdiction of this Court is invoked under Section 1254 (1) of Title 28 U. S. C. On October 22, 1951, this Court granted the petition for a writ of certiorari.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act, as amended, are set forth in the Appendix, *infra*, pp. 24-26.

QUESTION PRESENTED

This brief is addressed solely to petitioners' contention that a strike for an object proscribed by Section 8 (b) (4) (D) of the National Labor Relations Act does not violate that Section unless the strike has been preceded by Board determination, made pursuant to Section 10 (k), of the underlying jurisdictional dispute, adverse to the striking union.

STATEMENT

The instant case arises out of a suit for damages brought by respondent Corporation against petitioners in the District Court of the Territory of Alaska under Section 303 (a) (4) and 303 (b) of the Labor Management Relations Act, 1947. In substance, the complaint alleged and the support-

ing evidence showed, as fully set forth in the briefs of the parties (Pet. Br. 6-15; Resp. Br. 4-12), that petitioners injured the Corporation in its business and property by picketing the Corporation's place of business from April 10, 1948 to May 9, 1949, and thereby inducing or encouraging the employees of the Corporation to engage in a strike or concerted refusal in the course of their employment to perform services for the Corporation, in order to force or require it to assign certain barge loading work to members of petitioner Local 16 rather than to employees of the Corporation who were members of another labor organization. The district court held that petitioners had violated Section 303 (a) (4) by picketing the Corporation's premises during the stated period and entered judgment against petitioners for $750,000 for damages suffered by the Corporation during that period. The court below affirmed the judgment.

Petitioners contend that Section 303 (a) (4) of the Labor Management Relations Act proscribes the same conduct as Section 8 (b) (4) (D) of the National Labor Relations Act and that both Section 303 (a) (4), and Section 8 (b) (4) (D), should be read as rendering illegal only such picketing by petitioners as took place after and in the face of the determination by the National Labor Relations Board on April 1, 1949, pursuant to the provisions of Section 10 (k) of the National Labor Relations Act, that the members of Local 16 were not entitled

to the work in dispute. Petitioners assert that the trial court erred in awarding damages for picketing which preceded the Board's determination of dispute.

The same events which gave rise to the instant action for damages were considered by the National Labor Relations Board in two proceedings, one under Section 10 (k) and the other under Section 10 (b) and (c) of the National Labor Relations Act. Because these proceedings are relevant to petitioners' present contentions based upon Section 10 (k) and 8 (b) (4) (D) of the Act, we summarize them here.

A. The Board's Determination of Dispute Under Section 10 (k) of the Act

In August and September, 1948, the Corporation filed charges with the Board alleging, *inter alia*, that petitioner Local 16 had engaged in unfair labor practices, within the meaning of Section 8 (b) (4) (D), by picketing the Corporation's operations and thereby inducing and encouraging its employees to engage in a strike or concerted refusal to perform services in the course of their employment, in order to force the Corporation to assign certain barge loading work to members of Local 16 instead of to the Corporation's employees who were members of another union. The Board's regional director investigated the charges. Upon that investigation he concluded that there was reasonable cause to believe that the charges were true

and, pursuant to the Board's Rules and Regulations, he thereupon served notice on the interested parties that the charges had been filed and that a hearing would be conducted pursuant to Section 10 (k) of the Act on the dispute out of which the alleged unfair labor practices had arisen. Thereafter, the Board, pursuant to Section 10 (k), proceeded to hear and determine the dispute out of which the alleged unfair labor practices had arisen. The Board's determination of the dispute and its subsidiary findings of fact may be summarized as follows (82 NLRB 650):

In May, 1947, the Corporation purchased from Juneau Lumber Mills, Inc., a sawmill and planing mill at Juneau, Alaska. During the same month, the corporation rehired all the mill employees of its predecessor and began operations. Later that year the Corporation acquired a seagoing barge for use in transporting lumber to points in Canada and the United States and in October it began using its millyard workers to load lumber on the barge. These employees were members of the International Woodworkers of America, Local No. M-271. In November, 1947, the Corporation formally recognized the Woodworkers as the bargaining representative of its millyard workers and entered into a collective bargaining agreement.

Meanwhile, in October, 1947, petitioner Local 16 learned that the Corporation's mill workers were loading the barges. It notified the Corporation

that such work "belonged" to it and that its members should be assigned to the work of loading barges. Local 16 at this time and at all times thereafter had no members among the Corporation's employees. The Corporation refused to accede to this demand and in February, 1948, Local 16 established a picket line at the Corporation's operations at Juneau. The mill employees refused to cross the picket line and all mill operations thereupon ceased.

In July, 1948, the Woodworkers authorized its members to return to work despite the picket line and the mill employees accordingly resumed work. Local 16 continued to picket the Corporation's premises.

In August, 1947, the Corporation moved a load of lumber by tug and ocean-going barge from Juneau where it had been loaded by the millyard employees. When the barge and cargo arrived at Prince Ruppert, British Columbia, members of a sister local of Local 16 refused to unload it because it had come from behind a picket line. The barge was then moved to a port in the United States where it was unloaded.

On the record before it, summarized above, the Board found that there was reasonable cause to believe that the picketing engaged in by Local 16 constituted an unfair labor practice within the meaning of Section 8 (b) (4) (D) of the Act and that it therefore was empowered, as provided in Section 10 (k), to hear and determine the jurisdic-

tional dispute out of which the alleged unfair labor practices had arisen. The Board concluded and determined that Local 16 was not lawfully entitled to require the Corporation to assign the work in dispute to members of Local 16 rather than to employees of the Corporation who were members of the Woodworkers. The Board's Decision and Determination of Dispute, containing these findings and conclusions was issued on April 1, 1949.

B. The Board's Decision and Order Under Section 10 (b) of the Act

After the Board had issued its Determination of Dispute, as set forth above, Local 16 failed and refused to comply with that determination and continued to picket the Corporation's premises at Juneau in support of its demand that the barge loading work be assigned to its members. On April 28, 1949, the General Counsel of the Board issued a complaint, as provided in Section 10 (b) of the Act, alleging, *inter alia,* that Local 16 had violated Section 8 (b) (4) (D) of the Act by picketing the Corporation's premises for the stated purpose. Thereafter, on August 7, 1950, the Board, upon the usual proceedings under Section 10 of the Act, issued its findings of fact, conclusions of law, and order which are reported at 90 NLRB 1753. The subsidiary facts found by the Board in this proceeding were substantially the same as those previously found in the proceeding under Section 10 (k). The Board further found that Local 16 had refused to comply with the See-

tion 10 (k) determination of the jurisdictional dispute. Upon these facts the Board concluded that Local 16 had violated Section 8 (b) (4) (D) by picketing the Corporation's premises and thereby inducing and encouraging the Corporation's employees to engage in a concerted refusal in the course of their employment to perform services for the Corporation, with the object of forcing the Corporation to assign the barge loading work to members of Local 16 instead of to the mill and millyard employees of the Corporation.

The Board's order required Local 16, *inter alia*, to cease and desist from the unfair labor practices found.

ARGUMENT

This case presents questions of the construction and application of Sections 303(a)(4) and 303(b) of the Labor Management Relations Act, authorizing suits for damages by injured employers. Petitioners' argument rests in part, however, on an asserted analogy to Sections 8(b)(4)(D) and 10(k) of the Act relating to proceedings by the Board. The Board takes no position on the question whether the limitation, contained in Section 10(k), upon the power of the Board to proceed in Section 8(b)(4)(D) cases in the absence of a showing of noncompliance with the Board's jurisdictional dispute determination can or should be deemed to limit the power of the district courts, under Section 303(b) of the Labor Management Relations Act, to award damages in cases arising

under Section 303(a)(4) of that Act. But because the parties have sought to raise questions of the construction and application of Sections 8(b)(4)(D) and 10(k) of the Act, the Board wishes to make known its views on these questions.

Section 8(b)(4)(D) defines as unfair labor practices certain types of strikes arising out of jurisdictional disputes between unions. Section 10(k) provides a special procedure for expeditious settlement of such jurisdictional disputes. Petitioners' contention is that no violation of Section 8(b)(4)(D) can occur until the Board has made a determination of the jurisdictional dispute pursuant to Section 10(k). For reasons which we shall develop in this Memorandum, the Board believes that petitioners' contention is untenable and would in effect write both Section 10(k) and Section 8(b)(4)(D) out of the Act.

[redacted]

The Board is empowered to hear and determine a jurisdictional dispute under Section 10(k) only if it has cause to believe that the dispute has already given rise to an unfair labor practice within the meaning of Section 8(b)(4)(D).[1]

[1] *Herzog* v. *Parsons*, 181 F. 2d 781 (C. A. D. C.), certiorari denied, 340 U. S. 810; *LeBaron* v. *Los Angeles Building Trades Council*, 84 F. Supp. 629, 633 (S. D. Cal.), affirmed, 185 F. 2d 405 (C. A. 9), judgment vacated on ground of mootness, October 8, 1951, No. 31, this Term; *Winslow Bros. and Smith Co.*, 90 NLRB 1379; *Ship Scaling Contractors Association*, 87 NLRB 92, 93.

Thus, if, as a matter of law, no such unfair labor practice could arise prior to a Board determination of the dispute, no Section 10 (k) determination could ever be made, for, at that stage, the requisite belief that an unfair labor practice had occurred could not be entertained. And since, on petitioners' theory, a Section 10 (k) determination is a prerequisite to the existence of a violation of Section 8 (b) (4) (D), if no Section 10 (k) determinations could be made, no violations of Section 8 (b) (4) (D) could occur. Avoidance of these stultifying consequences is of manifest importance to the administration of the National Labor Relations Act.

In the Board's view Section 10 (k) was designed to facilitate adjustment of jurisdictional disputes which have already given rise to strikes in violation of Section 8 (b) (4) (D). Such adjustment of the underlying dispute, when accepted by the parties concerned, constitutes an alternative, and more expeditious, method than conventional unfair labor practice proceedings, for eliminating such strikes in the future. Recognizing this, Congress provided that in Section 8 (b) (4) (D) cases the alternative adjustment procedure should first be exhausted and that only if that procedure proves unsuccessful should the Board proceed conventionally pursuant to Section 10 (b) to remedy the unfair labor practice. In this view Section 10 (k) does not constitute a modification of the unfair

labor practice defined in Section 8 (b) (4) (D), but rather imposes a limitation upon the power of the Board to remedy such unfair labor practices pursuant to Section 10 (b) and (c). This construction alone, we submit, is compatible with the terms of the Act, and the objectives of Congress.

I. The Language and Structure of the Statute Are Incompatible With the Assumption That Violations of Section 8 (b) (4) (D) May Occur Only After the Board Has Determined the Underlying Jurisdictional Dispute Pursuant to Section 10 (k)

In Section 8 (b) (4) (D) Congress defined as an unfair labor practice by a labor organization a strike designed to force or require "any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The proviso to that Section exempts such strikes only where the *employer involved* "is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Nothing in the broad language of this prohibition suggests that unless it is preceded by a Board determination a strike for the forbidden object is immune. And the proviso's exemption of such strikes only when they occur after a Board determination to which the employer has failed to conform demonstrates that illegality does not depend

upon the existence of a Board determination. Petitioners' view would completely transform the proviso by, in effect, substituting for the phrase "unless such employer is failing, etc.", the phrase, "only if such labor organization is failing."

The procedure adopted for remedying violations of Section 8 (b) (4) (D) confirms the view that Congress did not intend to defer prohibition of jurisdictional strikes until the Board had resolved the underlying disputes pursuant to Section 10 (k). Proceedings in Section 8 (b) (4) (D) cases, as in the case of other unfair labor practices, are initiated by the filing of charges with the Board pursuant to Section 10. Section 10 (k) provides:

> *Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph 4 (D) of section 8 (b)*, the Board is empowered and directed to hear and determine *the dispute out of which such unfair labor practice shall have arisen*, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed. [Italics added.]

Thus, until a violation of Section 8 (b) (4) (D) has been charged the Board is without power to hear and determine the jurisdictional dispute. The provision for the filing of charges obviously contemplates that an unfair labor practice, on which such charges could be based, may already have occurred. And the use of the past tense in the italicized phrase which authorizes the Board to hear and determine the dispute out of which "such unfair labor practice shall have arisen," demonstrates beyond doubt that Congress assumed that an unfair labor practice may have occurred prior to the Board's determination of the jurisdictional dispute.

Moreover, the Board and the courts have held that the Board may not proceed to hear and determine a jurisdictional dispute pursuant to Section 10 (k) unless, after administrative investigation, there is reasonable cause to believe that the charge alleging that a violation of Section 8 (b) (4) (D) has occurred is true. The Board's Rules and Regulations (Series 6), provide (Section 101.29-101.31) that when an 8 (b) (4) (D) charge is filed, the Regional Director shall investigate such charges in the same manner as other unfair labor practice charges. If his investigation discloses that there is merit to the charge, he is authorized to issue a notice of Section 10 (k) hearing which is served on all parties to the jurisdictional dispute out of which the unfair labor practices are alleged

to have arisen. In *Herzog* v. *Parsons*, 181 F. 2d 781, 784 (C. A. D. C.), certiorari denied, 340 U. S. 810, the court said:

> * * * the Board may not hear and determine a dispute under 10 (k) unless an 8 (b) (4) (D) violation has resulted. The existence of an unfair labor practice within the meaning of 8 (b) (4) (D) is a *sine qua non* to the Board's power to hear and determine such a dispute. A mere charge of an 8 (b) (4) (D) violation does not, *ipso facto*, operate to give verity to the existence of such an unfair labor practice. Thus before the Board may proceed to a hearing it must determine whether in fact the dispute does give rise to the 8 (b) (4) (D) violation, and, in order to make this determination, it must conduct a preliminary investigation. This is the only rational construction that can be made of the language of 10 (k) itself.[2]

And in *LeBaron* v. *Los Angeles Building Trades Council*, 84 F. Supp. 629, 635 (S. D. Cal.), affirmed,

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[2] The quoted language appears to require qualification in that the Board's administrative investigation leads only to determination whether reasonable cause exists to believe that a violation has been committed, not to final determination whether a violation has in fact occurred. The issue on the merits is reserved for further proceedings under Section 10 (b). With this qualification, however, the statement is in accord with the Board's view that it may proceed to a 10 (k) hearing only after preliminary investigation discloses probable cause to believe the charge true.

185 F. 2d 405 (C. A. 9), judgment vacated on ground of mootness, October 8, 1951, No. 31, this Term, the district court said: "The action of the Board, in making a determination under the provision of Section 10 (k) of the Act, is a confirmation of the existence of reasonable cause to believe that the charge is true." See also, *Ship Scaling Contractors Association*, 87 NLRB 92, 97; *Winslow Bros. and Smith Co.*, 90 NLRB 1379, 1383; *Teleprompter Service Corp.*, 95 NLRB No. 199.

To achieve exemption from the reach of Section 8 (b) (4) (D), of jurisdictional strikes which precede Board determination of the underlying dispute petitioners rely upon the directive in Section 10 (k) that "Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." Petitioners find in this provision, which qualifies the Board's normal procedure for remedying unfair labor practices under Section 10, a substantive modification of the unfair labor practice defined in Section 8 (b) (4) (D).

The mandatory dismissal of charges upon voluntary adjustment of the dispute or compliance with the Board's determination does no more than effectuate the objectives of Congress in establishing, in Section 10 (k), an alternative, and more expeditious, method than the usual unfair labor practice proceeding for ending jurisdictional

strikes. The function of Section 10 (k) proceedings is to expedite adjustment of the disputes which give rise to the strikes prohibited by Section 8 (b) (4) (D). It affords first the parties themselves, and then the Board, an opportunity to resolve the underlying issues. If this procedure is successful in adjusting the basic dispute, thereby eliminating the danger of future unfair labor practices, conventional remedial proceedings are pretermitted. *Juneau Spruce Corp.*, 82 NLRB 650, 655-656. Obviously, this provision for mandatory dismissal of charges does not imply that no violation of Section 8 (b) (4) (D) could have occurred; it implies at most that the violation of that Section which may have occurred has adequately been remedied. If the Section 10 (k) procedure is unsuccessful in eliminating the basic dispute, the Board proceeds conventionally to remedy the unfair labor practice, and, as in this very case, *supra*, pp. 7-8, its unfair labor practice findings may be based on conduct which preceded, as well as that which followed, its Section 10 (k) determination.

Petitioners' construction, moreover, is incompatible with the objectives of Congress in extending the provisions for interim injunctive relief under Section 10 (l) to cases arising under Section 8 (b) (4) (D). Section 10 (l) requires that priority be given to the preliminary investigation of charges alleging violation of Sections 8 (b) (4)

(A), (B) and (C), and further directs the officer to whom the matter has been referred, if he "has reasonable cause to believe that such charge is true and that a complaint should issue," to apply for appropriate injunctive relief "pending the final adjudication of the Board with respect to such matter." The concluding sentence of Section 10(l) provides: "In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8(b)(4)(D)."

Senator Ellender, a member of the Conference Committee, explained this provision on the floor of the Senate as follows (2 Legislative History of the Labor Management Relations Act, 1947, p. 1068, 93 Cong. Rec. 4138):

> As I pointed out a while ago, * * * jurisdictional strikes are treated as unfair labor practices. Should a complaint be made by an employer, all he would have to do, in effect, would be to let it be known, and the local attorney in the regional office would have the power to make a quick investigation. If he should find that there was a jurisdictional strike in progress or in the offing, he could investigate. If in his judgment it would cause irreparable injury to the employer, he would have the right to go into court and obtain an injunction. He could obtain a cease-and-desist order. If perchance the union should continue its illegal

> conduct it could be punished. Its officers could be cited for contempt of court.

Senator Ellender's remarks confirm the plain implication of the text of Section 10(l), namely, that Congress intended to authorize interim injunctive relief against jurisdictional strikes, and to make such relief available promptly upon the filing of a charge after the regional officer's investigation revealed reasonable cause to believe that the charge was true. Nothing in the text or legislative history of the Act suggests that Congress intended to postpone the availability of such relief until after the Board had conducted a hearing under Section 10(k) and made its determination of the underlying dispute. Indeed, petitioners concede (Br. pp. 38-39, n. 21), that injunctive relief may properly be obtained prior to the Board's Section 10(k) determination. Yet, if petitioners' theory were adopted injunctive relief could not be obtained in Section 8(b)(4)(D) cases until the Section 10(k) procedure had been exhausted.

II. Petitioners' Construction of Sections 8 (b) (4) (D) and 10 (k) Is Not Supported by the Decisions of the Board Upon Which Petitioners Rely

Petitioners assert (Br. 24-31) that the Board has consistently held that "a strike, within the plain terms of Section 8(b)(4)(D), which occurs prior to a Board determination under Section 10(k), does not constitute a violation of Section 8(b)(4)(D)." In support of this assertion peti-

tioners rely particularly upon the Board's decisions in *Juneau Spruce Corp.*, 82 NLRB 650 and 90 NLRB 1753, *Irwin-Lyons Lumber Co.*, 83 NLRB 341[3] and *Westinghouse Electric Corp.*, 94 NLRB No. 63. In none of these cases did the board so hold.

In the first *Juneau Spruce* case it was urged by the employer that it was unnecessary for the Board to make any jurisdictional dispute determination under Section 10(k)[4] and that since the

[3] The quotation from this case which appears at pp. 28-29 of petitioners' brief appears in the Board's decision and order denying motion for rehearing which is reported at 83 NLRB 341, and not in 82 NLRB 916, as cited by petitioners.

[4] In that case, as in this one, see pp. 4-7, *supra*, the employer had assigned the work in issue to one group of employees and the labor organization involved struck to compel the employer to assign the work to another group. In such cases the Board unanimously holds that Sections 8(b) (4) (D) and 10(k) do not authorize the Board "to deprive an employer of the right to assign work to his own employees" and that for this reason "the employer in most cases will have resolved by his own employment policy, the question as to which organization shall be awarded the work." *Westinghouse Electric Corp.*, 83 NLRB, at 481, and cases cited. In the *Juneau Spruce* case two Members of the Board, Messrs. Houston and Murdock, agreed with the employer's contention that because the Board's Section 10(k) determination could do no more than confirm the employer's prior resolution of the "jurisdictional" issue, against which the strike in violation of Section 8(b)(4)(D) had occurred, the Board "should eschew the pretense of *deciding* such matters under Section 10(k) of the Act," and proceed instead immediately to the conventional remedy through Section 10(b) proceedings (*ibid.*).

The only cases in which the Board will undertake in a Section 10(k) proceeding to overrule an employer's award of work

evidence presented in the Section 10(k) hearing contained all the elements necessary to show that an unfair labor practice under Section 8(b)(4)(D) had been committed, the Board should proceed forthwith to hear and remedy the unfair labor practice pursuant to Section 10(b) and (c). Answering this contention, the Board held that under the express terms of Section 10(k) the Board must first attempt to resolve the underlying jurisdictional dispute by means of a Section 10(k) determination, and that an unfair labor practice complaint should issue only in the event of noncompliance with that determination. In the second *Juneau Spruce* case the Board, consistently with the provisions of Section 10(k) which require the

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assignments to one group of employees rather than another are those in which the group denied the work either has an existing contract or has received a Board certificate or order which entitles it to the work. *Teleprompter Service Corp.*, 95 NLRB No. 199; *Juneau Spruce Corp.*, 82 NLRB 650. The only cases in which the Board will determine a jurisdictional dispute *ab initio*, in terms of industry custom, or tradition, for example, are those in which the employer takes no position as to which of two labor organizations, both representing persons in his employ, shall be entitled to the work, thereby, in effect, voluntarily yielding to the Board the employer's right to make the work assignment. That was the situation in *Winslow Bros. & Smith Co.*, 90 NLRB 1379, upon which petitioners rely (Br. pp. 42, 49, 50). See also, *Irwin-Lyons Lumber Co.*, 82 NLRB 916; *Middle States Telephone Co.*, 91 NLRB 598. For the convenience of the Court we have listed in Appendix B, *infra*, all of the jurisdictional dispute cases dealt with by the Board under Sections 10(k) and 8(b)(4)(D).

dismissal of charges alleging violations of Section 8(b)(4)(D) if there has been compliance with a Section 10(k) determination, merely held that a showing of non-compliance with such a determination was essential to a *finding* that a violation of Section 8(b)(4)(D) had occurred (*cf.* Petitioners' brief, p. 29). In the *Irwin-Lyons* case the Board stated that a Section 10(k) hearing is a non-adversary proceeding involving only a preliminary administrative determination for the purpose of resolving the jurisdictional dispute and that the unfair labor practice charges which empower the Board to make that determination are to be litigated in a subsequent adversary hearing under Section 10(b) of the Act in the event the underlying dispute remains unresolved. None of these cases even remotely suggests that the Board was enunciating the proposition which petitioners seek to attribute to it.

In the *Westinghouse* case, after the labor organization involved had been charged with violating Section 8(b)(4)(D), the Board conducted a hearing pursuant to Section 10(k) and issued its Decision and Determination of Dispute, 83 NLRB 477. Thereafter, the General Counsel of the Board issued a complaint alleging that the union had engaged in unfair labor practices in violation of Section 8(b)(4)(D). The complaint did not allege that the union had failed to comply with the Board's Determination of Dispute, and no evi-

dence as to compliance or non-compliance was adduced at the hearing. In its initial decision, 88 NLRB 1101, the Board construed the directive in Section 10(k)—that upon compliance with the Board's determination the charge should be dismissed—as imposing upon the General Counsel, in proceedings under Section 10(b), the burden of proof of non-compliance. The Board remanded the case to the trial examiner to afford the General Counsel an opportunity to allege and prove noncompliance. Following the proceedings on remand, the Board found that the General Counsel had failed to prove that the union had not complied with the Board's determination and therefore dismissed the complaint.

Manifestly, this holding does not imply that the Board deems proof of noncompliance a prerequisite to the existence of a violation of Section 8 (b) (4) (D). It demonstrates, rather, that the Board considers the directive to dismiss charges upon compliance as a limitation upon its authority to proceed under Section 10 (b) to *remedy* violations of Section 8 (b) (4) (D). Thus, as we have seen, pp. 7-8, 16, *supra*, where noncompliance is shown in Section 10 (b) proceedings the Board bases its findings upon conduct which preceded as well as that which followed its determination under Section 10 (k), and the General Counsel, in the *Westinghouse* case itself, *supra*, as well as in other

cases[5] has applied for injunctive relief under Section 10(l) before the Board made its Determination of Dispute under Section 10 (k).

CONCLUSION

For the reasons set forth above, this Court should not hold that no violation of Section 8 (b) (4) (D) can occur until the Board has made a determination of the jurisdictional dispute pursuant to Section 10 (k).

Respectfully submitted,

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DECEMBER, 1951.

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[5] *Brown* v. *Roofers & Waterproofers Union*, 86 F. Supp. 50 (N. D. Calif.); *Brown* v. *Longshoremen's Union* (N. D. Calif.), 27 LRRM 2410; *Shore* v. *Local 596, International Brotherhood of Electrical Workers* (D. W. Va. Jan. 10, 1950; unreported); *Brown* v. *Local 48, International Longshoremen's Union* (D. Oreg., March 15, 1951; unreported).

APPENDIX A

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Supp. IV, 151, *et seq.*), are as follows:

Sec. 8. * * *

* * * * *

(b) It shall be an unfair labor practice for a labor organization or its agents— * * *

(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: * * *

(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: * * *.

Sec. 10. * * *

* * * * *

(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b),

the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

(l) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction

to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: * * * In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D). * * *

APPENDIX B

Section 10 (k) Cases decided by the Board

Moore Drydock Co., 81 NLRB 1108
Juneau Spruce Corp., 82 NLRB 650
Irwin-Lyons Lumber Co., 82 NLRB 916, 83 NLRB 341
Westinghouse Electric Corp., 83 NLRB 477
Ship Scaling Contr. Ass'n., 87 NLRB 92
Stroh Brewery, 88 NLRB 844
Albers Milling Co., 90 NLRB 1015
Winslow Bros., 90 NLRB 1379
Middle States Telephone Co., 91 NLRB 598
New London Mills, 91 NLRB 1003
Lumber Dealers, 92 NLRB 632
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